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NO. 83-5942

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN HENRY KNAPP,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

A. Does this court need to consider this petition?

B. Is petitioner entitled to relief based upon the seizure of evidence?

C. Is petitioner entitled to relief under Michigan v. Tyler?

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I. STATEMENT OF THE CASE

On November 16, 1973, at 8:28 a.m., Rural Metro Fire Department received a call that a house at 7435 East Capri in Mesa was on fire. (R.T. of Oct. 23, 1974, at 30, 39, 55, 56, 64; R.T. of Oct. 24, 1974, at 56.) It took the firemen 2 minutes to get to the house. (R.T. of Oct. 23, 1974, at 39, 55, 56, 64; R.T. of Oct. 24, 1974, at 57.) Among the first firemen to arrive were Chief Geary Roberts, Monty Brow, Roy Skowron, and John Wilson. Upon arrival, they saw smoke coming out of one window of the house. (R.T. of Oct. 23, 1974, at 30, 54, 57, 64; R.T. of Oct. 24, 1974, at 57.) It took them about 3 to 4 minutes to put out the fire. (R.T. of Oct. 23, 1974, at 80; R.T. of Oct. 24, 1974, at 58.) At 8:35, Sheriff's Deputy John H. Chernko arrived. (R.T. of Oct. 23, 1974, at 80.) Upon entering the bedroom that had been on fire, Chief Roberts, Brow, Skowron, Wilson, and Deputy Chernko found the bodies

of Linda and Iona Knapp. (R.T. of Oct. 23, 1974, at 32, 58, 67, 75; R.T. of Oct. 24, 1974, at 59.) Chief Roberts, Brow, Skowron, Wilson, and Deputy Chernko all remained at the house until Fire Inspector James McDaniel and photographer Steve Hermann arrived. (R.T. of Oct. 23, 1974, at 35, 59, 61; R.T. of Oct. 24, 1974, at 42, 59, 62 80; R.T. of Oct. 28, 1974, at 11, 104; R.T. of Oct. 29, 1974, at 2.) At approximately 10:30 that morning, photographer Steve Hermann and fire inspector James McDaniel arrived. (R.T. of Oct. 23, 1974, at 30; R.T. of Oct. 28, 1974, at 4.) Steve Hermann took numerous photographs of the bedroom and other rooms prior to the removal of the bodies or any debris. (R.T. of Oct. 24, 1974, at 31-32, 36-37.) Under the direction of Inspector McDaniel, Chief Roberts, Row, Skowron, and Wilson removed the debris from the room while Hermann took photographs so that they could determine the cause of the fire. (R.T. of Oct. 23, 1974, at 35-36, 61, 69-70; R.T. of Oct. 24, 1974, at 32-41, 61-62, 79, 81; R.T. of Oct. 28, 1974, at 6-7, 104.) While removing the debris, several of the men noticed an oily film on top of the water in the room, but it was not until they had removed the carpet from the room and saw the burn marks on the floor that they began to suspect arson. (R.T. of Oct. 23, 1974, at 36, 61; R.T. of Oct. 24, 1974, at 42, 45, 61; R.T. of Oct. 28, 1974, at 11.) While they were removing the debris, the men took samples of the oily film, carpets, and wood. (R.T. of Oct. 23, 1974, at 59; R.T. of Oct. 24, 1974, at 63, 80; R.T. of Oct. 28, 1974, at 8.)

Early that morning, State Fire Marshall David Dale received a call from one of the fire chiefs asking if he would help in the investigation. (R.T. of Oct. 29, 1974,

at 65.) Dale said that he would do so only in response to a formal request. (Id.) Dale received another call at 12:15 p.m., and arrived at the home at 12:55. (Id.) By this time, the men there had collected all of the samples, so Dale conducted a visual examination of the home. (Id. at 65-66.) At approximately 2:30 p.m., Sheriff's Deputy Leon Stratton arrived, but he did not seize any evidence that day. (R.T. of Oct. 31, 1974, at 43, 55.)

Some time during the morning of the fire, one of the deputies called the justice of the peace Leo S. Coombs and told him of the deaths. (R.T. of Aug. 6, 1974, at 79.) That morning, Coombs had a full schedule and could not get out to the scene of the fire. (Id.) Acting as coroner, he directed the deputies to seal the house and to make a full investigation of the deaths. (Id. at 98-100.) The deputies called him on three different occasions on subsequent days and asked him for permission to go back into the house, which he authorized. (Id. at 98-99.) On October 19, 1974, Deputy Stratton reentered the house and seized a Coleman fuel can in the living room and a Coleman lantern in the bathroom, which were the only two items of evidence seized from the home after the day of the fire. (R.T. of Oct. 31, 1974, at 44-47.)

Prior to petitioner's trial, petitioner never moved to suppress any of the evidence seized the day of the fire; he moved only to suppress the evidence seized after the day of the fire, and moved to suppress his confession. (R.T. of Aug. 6, 1974, at 5; R.T. of Aug. 7, 1974, at 95.) The trial court denied both motions. (R.T. of Aug. 7, 1974, at 133; R.T. of Aug. 8, 1974, at 3.)

The jurors ultimately found petitioner guilty, and the trial court sentenced him to death. (R.T. of Jan. 6, 1975,

at 169.) On appeal, petitioner did not raise the issue of the seizure of the evidence after the day of the fire, but he did challenge the admission of his confession. The Arizona Supreme Court affirmed the judgment and sentence. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). The United States Supreme Court denied certiorari on the question of authorizing court funds to construct the full-scale replica of the children's room. Knapp v. Arizona, 435 U.S. 908 (1978). In 1978, petitioner filed a petition for post-conviction relief claiming newly-discovered evidence showing doubt about petitioner's guilt. Petitioner also had to be resentenced pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). The trial court denied the petition for post-conviction relief and resentenced petitioner to death. (R.T. of May 25, 1979, at 75, 80-81.) The Arizona Supreme Court affirmed both of these rulings. State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), and 127 Ariz. 65, 618 P.2d 235 (1980). In February 1983, petitioner filed a second petition for post-conviction relief, claiming among other things that all evidence seized from the house was seized unlawfully. The superior court ruled that, even if the Coleman can and lantern were seized unlawfully, admission of this evidence was harmless beyond a reasonable doubt, since numerous witnesses saw these items the day of the fire and testified about them. (Exhibit "B" at 1-2.) The superior court concluded that petitioner also was not entitled to relief based on the admission of evidence seized the day of the fire. (Exhibit "B" at 2.) The superior court denied petitioner's motion for rehearing, and the Arizona Supreme

Court denied review. (Exhibit "C.") This petition for writ of certiorari followed.

II. ARGUMENTS

A. THIS COURT DOES NOT NEED TO CONSIDER THIS PETITION.

One of the main reasons for the discretionary granting by this Court if petitions for writs of certiorari is to clarify the law for the lower courts. In Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and most recently in Michigan v. Clifford, 52 U.S.L.W. 4056 (U.S., Jan. 11, 1984), this Court spoke on the question of search and seizure of evidence after a fire. Because this Court has so recently spoken on this issue, there is no need to speak further and add anything further to the case law given.

B. PETITIONER IS NOT ENTITLED TO RELIEF BASED UPON THE SEIZURE OF EVIDENCE.

1. Petitioner has waived any issue concerning the seizure of evidence.

Petitioner contends that evidence used against him was seized in an unconstitutional, warrantless search. Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, precludes relief on any ground knowingly, voluntarily, and intelligently not raised at trial, on appeal, or in a previous collateral proceeding. On August 6, 1974, petitioner filed a motion to suppress all evidence seized on November 19, 21, and 23, 1973, by deputies of the Maricopa County Sheriff's Office. This motion was signed by David W. Basham and David W. Basham for Charles C. Diettrich. On August 6, 1974, Diettrich questioned Judge Leo S. Coombs in connection with the motion to suppress. (R.T. of Aug. 6, 1974, at 98-99.) On August 7, 1974, Basham stated that they were moving to suppress only those

items taken from the house after November 16, 1973, the day of the fire. (R.T. of Aug. 7, 1974, at 95.) Basham later argued the motion to the trial court. (Id. at 141-50.) The next day, the trial court denied the motion. (R.T. of Aug. 8, 1974, at 3.)

Prior to the second trial, Diettrich renewed the motion to suppress. (R.T. of Oct. 23, 1974, at 2-3.) During trial, Diettrich again renewed his motion to suppress any evidence seized after November 16, 1973. (R.T. of Oct. 31, 1974, at 45.) At the hearing on the motion for new trial, Diettrich argued that petitioner should receive a new trial because of the admission of evidence unconstitutionally seized. (R.T. of Jan. 16, 1975, at 111-12.) Diettrich filed a supplement to his motion for a new trial, wherein he again stated that petitioner should receive a new trial because of the admission of evidence seized after the date of the fire. (Supplement to Motion for New Trial, filed Jan. 9, 1975, at 1.) Diettrich later filed the briefs in the appeal on this conviction and sentence, but did not raise any issue about the admission of evidence seized from petitioner's house. (Opening Brief, filed July 1, 1975; Reply Brief, filed Aug. 25, 1975.) This shows that Mr. Diettrich made a decision at trial not to raise an issue about the admission of evidence seized the day of the fire, and made a decision on appeal not to challenge the seizure of any of the items of evidence. Because Diettrich never challenged the admission of items seized the day of the fire and because the only items of evidence seized after the date of the fire were a Coleman lantern found in the bathroom and a full can of Coleman fuel found in the living room, it appears that Diettrich concluded that this issue would not have been the basis for any relief for his

client, and therefore chose not to raise it. Because of the abandonment of this issue at trial and on appeal, petitioner is precluded from relief on this issue.

Petitioner's present claim for relief however, is based on Michigan v. Tyler, supra, which was not decided until 4 years after petitioner's trial. Rule 32.2(b), Arizona Rules of Criminal Procedure, provides that preclusion shall not apply to any claim based upon Rule 32.1(g), Arizona Rules of Criminal Procedure, which provides as follows:

> There has been a significant change in the law applied in the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive applications of the changed legal standards.

If Michigan v. Tyler does not amount to a "significant change" in the law, then petitioner is precluded from raising this issue; if it does, then petitioner is entitled to relief only if Michigan v. Tyler should be applied retroactively. The retroactive application of Michigan v. Tyler will be discussed in subsection 2.

2. Michigan v. Tyler should be applied prospectively only.

Based upon Michigan v. Tyler, supra, petitioner contends that the trial court improperly admitted evidence seized from the house. That case held that firefighters do not need a warrant to enter a burning building, fight the fire, and remain in the building for a reasonable time to investigate the cause of the blaze. 436 U.S. at 509-10. At the time of the search in the present case, the law in Arizona was that authorities were permitted to make a warrantless, contemporaneous search of the scene of a homicide when the authorities were legally on the premises in the first instance. State v. Duke, 110 Ariz. 320, 324,

518 P.2d 570, 574 (1974); State v. Sample, 107 Ariz. 407, 409-10, 487 P.2d 44, 46-47 (1971). This holding is consistent with the cases the trial court considered in ruling on the motion to suppress. Steigler v. Anderson, 496 F.2d 793 (3d Cir.), cert. denied, 419 U.S. 1002 (1974); United States v. Garzotto, 476 F.2d 1009 (6th Cir. 1973), cert. denied, 421 U.S. 987 (1975); Stevens v. State, 443 P.2d 600 (Alaska 1968), cert. denied, 393 U.S. 1039 (1969); State v. Chapman, 250 A.2d 203 (Me. 1969); People v. Tyler, 50 Mich.App. 414, 213 N.W.2d 221 (1973), rev'd, 399 Mich. 564, 250 N.W.2d 467 (1977), aff'd, 436 U.S. 497 (1978); People v. Neulist, 43 App.Div.2d 150, 350 N.Y.S.2d 178 (1973); Tocher v. State, 501 S.W.2d 921 (Tex.Ct.Crim.App. 1973); Corbett v. State, 493 S.W.2d 940 (Tex.Ct.Crim.App. 1973), cert. denied, 414 U.S. 1131 (1974); Bennett v. Commonwealth, 212 Va. 863, 188 S.E.2d 215 (1972); Longuist v. State, 495 P.2d 575 (Wyo.), cert. denied, 409 U.S. 1006 (1972). This holding was subsequently limited by Michigan v. Tyler, supra, and was specifically rejected by Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), which relied heavily upon Michigan v. Tyler. The question then is whether Michigan v. Tyler and Mincey v. Arizona should be applied retroactively.

The first consideration in deciding whether to apply a rule retroactively is the purpose of the new rule. The purpose in Tyler and Mincey, as is the purpose of any exclusionary rule dealing with the seizure of physical evidence, is control of the activities of the authorities. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Because controlling the activities of the authorities means future activities only, new rulings on search and seizure questions have traditionally been

applied prospectively only. E.g., Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) (Mapp v. Ohio prospective only). For this reason, the rulings in Tyler and Mincey should be prospective only. The second consideration is reliance upon the old rule. Here we have authorities conducting their duties guided by court rulings, such as those in Sample and Duke. This again would indicate a prospective application only. The last consideration is the effect a retroactive application would have on the administration of justice. The effect would be that courts would reach into the past, hold inadmissible evidence that is not itself in any way unreliable (as an involuntary confession might be), and vacate an otherwise valid conviction. Again, there is no reason to have a retroactive application. For all of these reasons, Michigan v. Tyler and Mincey v. Arizona should be applied prospectively only, and this Court should not give petitioner any relief based upon these decisions.

Petitioner argues, however, that Michigan v. Tyler did not create a change in the law, so no question of retroactivity arises. The problem with this argument is that, if Michigan v. Tyler was the law at the time of the November 1973 search, then petitioner has waived this issue by failing to raise it at the trial and on appeal.

For further support, petitioner cites United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, ___ L.Ed.2d ___ (1982). That case dealt with the question whether to apply Payton v. New York, 445 N.J. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), to cases pending on appeal at the time of the opinion in Payton. Because the Arizona Supreme Court decided petitioner's appeal long before this Court

issued its opinion in Tyler and the present review is of a denial of a collateral attack, Johnson is of limited value.

C. EVEN UNDER MICHIGAN V. TYLER, PETITIONER IS NOT ENTITLED TO RELIEF.

Relying upon Michigan v. Tyler, supra, petitioner contends that certain items of evidence were improperly seized, and admission of this evidence entitles him to a new trial. In that case, the United States Supreme Court stated the following:

> A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.
>
> Although the Michigan Supreme Court appears to have accepted this principle, its opinion may be read as holding that the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidential destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been

> extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

436 U.S. at 509-10 (citations and footnote omitted). In its statement of the facts, the Supreme Court noted that the fire started at about midnight; Fire Chief See arrived at 2:00 a.m. just as the fire was extinguished, and met with Lt. Lawson, who informed him that they had found two plastic containers containing flammable liquid indicating arson; See telephoned Police Detective Webb, who arrived at 3:30 a.m. and took photographs; everyone left by 4:00 a.m. with See and Webb taking the two containers; at 8:00 a.m. See and Assistant Chief Somerville returned and then left; at 9:00 a.m. Somerville and Webb returned and saw suspicious burn marks on the carpet; they left to get some tools and then returned and removed pieces of carpet and stairs, and searched through the rubble looking for any other signs or evidence that showed how the fire was caused. 436 U.S. at 501-02. The Supreme Court held that the fire inspectors and the police did not need a warrant for any of those activities conducted on the morning of the fire, but that they did need a warrant for any entries made into the building after the day of the fire. 436 U.S. at 511.

Petitioner notes that the fire was extinguished at 8:30 a.m., Inspector McDaniel did not arrive until 10:30 a.m., Fire Marshall Dale did not arrive until 12:55 p.m., and deputy sheriff Stratton did not arrive until 2:30 p.m.

Petitioner overlooks the fact that Chief Roberts arrived while the fire was still burning, and he remained at the house all day and assisted in the investigation. Brow, Skowron, and Wilson also arrived while the fire was

burning, and remained at least until Inspector McDaniel had conducted his investigation. Fire officials therefore remained in petitioner's house continuously from the initial fighting until the conclusion of the investigation that day, which makes this case even stronger than Tyler, where fire officials vacated the premises several times the morning of the fire. Further, the fact that the investigation did not begin until 10:30 a.m. is of no import, since this Court has never held that only the firemen who arrived while the fire is burning may search for the cause of the fire. The fact that at some point the investigators began to suspect arson is also of no import. The purpose of the investigation was to determine the cause of the fire and it was not until the investigators had removed the debris and the carpeting from the room did they suspect arson. As noted in the discussion of Tyler, supra, prior to 2:00 a.m. Lt. Lawson found plastic cointainers containing flammable liquid, which indicated arson, but this did not make unlawful the subsequent search occurring after 9:00 a.m. In Tyler this Court sanctioned a search conducted at least 8 hours after the fire was extinguished; in the present case, 8 hours after the fire would be 4:30 p.m., well after the arrival of the last inspector, Deputy Stratton. The present search the day of the fire was just as permissible here as it was in Tyler.

The ruling in Michigan v. Clifford, supra, does not change this result. In that case, this Court held that officials do not need a warrant to remain in the building for a reasonable time, but they do need one if they extinguish the blaze and then leave the premises. 52 U.S.L.W. at 4058. Because the officials here remained on the scene continuously, Tyler and not Clifford applies.

Petitioner contends, however, that he is entitled to a hearing to determine when he various items of evidence were seized. No such hearing is needed. Attached as Exhibit "A" is a list of all evidence admitted at trial, with transcript cites showing where each exhibit was identified and where it was admitted. Most of these exhibits are photographs, all of which were taken the day of the fire. Of the physical objects taken from the house, the only two that were taken after the day of the fire are Exhibit 50, the full can of Coleman fuel found in the living room, and Exhibit 51, the Coleman lantern found in the bathroom. (R.T. of Oct. 28, 1974, at 24-25; R.T. of Oct. 31, 1974, at 44-47.) These are the only two exhibits to which petitioner objected on the basis of being taken from the residence after the day of the fire. (R.T. of Oct. 31, 1974, at 45, 47.) For the following reasons, respondent submits that these pieces of evidence should not have been suppressed, and admission of them was not reversible error.

1. The coroner and the sheriff's office had seized the entire home as evidence. At the time of the deaths of Linda and Iona Knapp, the following statutes were in effect governing the duties of a justice of the peace:

> Each justice of the peace shall be ex officio coroner within his precinct. In his absence from the precinct, any other justice of the peace in the county may act as coroner therein.

Ariz.Rev.Stat.Ann. § 22-501 (repealed Laws of 1975, Ch. 114, § 8).

> When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as afford reasonable ground to suspect that the death was occasioned by the act of another by criminal means, the coroner shall go to the place where the body is located, and forthwith summon not less than six nor more than twelve persons, qualified by law to serve as jurors, to appear before

> him forthwith at the place where the body of the deceased is located to inquire into the cause of the death.

Ariz.Rev.Stat.Ann. § 22-511 (repealed Laws of 1975, Ch. 114, § 8). This statute imposed upon Judge Leo S. Coombs the duty to hold an inquest into the deaths of Linda and Iona. Pursuant to this authority, on the day of the fire, he ordered the sheriff's office to seal the house and to make a full investigation for him. (R.T. of Aug. 6, 1974, at 98-100.) He gave permission over the telephone to various sheriff's deputies to go into the house to investigate the deaths. (Id. at 99-100.)

If authorities are lawfully on the premises, they may seize evidence that is in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In the present case, the entire house consisted of evidence of how the fire started. Because the authorities could not remove the entire house and place it in the property locker, they did the only thing they could -- seize it, seal it, and preserve it and all of its contents as evidence. As such, the entry on November 19, 1973, to obtain the Coleman can and Coleman lantern was not a search, and as such the sheriff's deputy did not need a warrant to do so. In this respect, the situation here differs from that in Tyler. In Tyler, the authorities left the building, and did not return until over 3 weeks later. Because this later entry was in no way connected with the original exigent circumstance that allowed the authorities to enter, this Court held that the authorities needed a warrant to reenter. But in the present case, because the authorities properly seized the entire house, their reentry was merely the removal of items already in their possession. Thus, no further warrant was necessary. See Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209

(1975) (when police have probable cause to search a vehicle when they arrest, they may seize the vehicle, take it back to the police station, and search it at their leisure).

2. Because John and Linda Knapp abandoned the premises, they have no standing to challenge the seizure of the Coleman can and Coleman lantern. A person has no standing to complain of a search or seizure of property he has voluntarily abandoned. State v. Walker, 119 Ariz. 121, 126, 579 P.2d 1091, 1096 (1978). In the present case, the trial court found that John and Linda never lived in the premises after the time of the fire. (R.T. of Aug. 8, 1974, at 3.) They thereby abandoned it. As such they cannot complain of the seizure of the property in question.

3. Because the sheriff's deputies acted in good faith, this Court should not suppress the Coleman can and the Coleman lantern. This Court presently has pending before it several cases involving the "good faith" exception to the warrant requirement. The basis of this exception is that the use of the good faith rationale in certain circumstances would not subvert the principal purpose of the exclusionary rule, which is to discourage future official misconduct by proscribing the use at trial of unlawfully obtained evidence. In the present case, the sheriff's deputies reentered the house only after they had received permission from Judge Coombs, who had ordered the house sealed and had ordered the deputies to conduct an investigation. (R.T. of Aug. 6, 1974, at 98-100.) Further, Arizona law at that time did not require a warrant in situations such as this. State v. Duke, supra, State v. Sample, supra. Application of the exclusionary rule to such a situation would not further the purpose of the exclusionary rule. This Court should therefore hold

that the evidence was admissible under the good faith exception.

4. Admission of the Coleman lantern and the Coleman can was harmless error. When evidence is erroneously admitted, reversal is not required if it can be said beyond a reasonable doubt that the evidence had no influence on the verdict by the jurors. Chapman v. California, 386 U.S. 18, 22-23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, (1967). In the present case, numerous witnesses testified about the presence of a Coleman lantern in the bathroom. (R.T. of Oct. 24, 1974, at 48; R.T. of Oct. 28, 1974, at 49; R.T. of Nov. 12, 1974, at 123.) The state introduced without objection a photograph of the lantern in the bathroom (Exhibit 36). (R.T. of Oct. 24, 1974, at 40-41; R.T. of Oct. 28, 1974, at 24.) When the state first offered the Coleman lantern in evidence, petitioner's counsel did not object. (R.T. of Oct. 28, 1974, at 25.) In light of all this testimony about the lantern and the photograph of it in the house, there is no way that the introduction of the lantern itself could have had any effect on the juror's verdict. Its admission therefore would have been harmless error.

The witnesses also mentioned many times the presence of the full can of Coleman fuel in the living room. (R.T. of Oct. 23, 1974, at 44, 62; R.T. of Oct. 24, 1974, at 45-48, 63-64; R.T. of Oct. 29, 1974, at 4, 70; R.T. of Oct. 30, 1974, at 9.) Because this can was full, it could not have been used in the fire. The only thing that removal of the can allowed the police to do was to run a fingerprint test on the can; the results, however, were inconclusive and were only that the can had smudged prints on it that would be comparable to adult prints, and that it had no

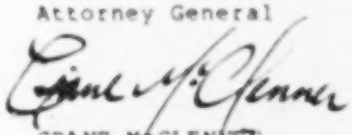
children's prints in it. (R.T. of Oct. 31, 1974, at 173.) Again, there is no way this evidence would have had any effect on the juror's verdict. Its admission too would have been harmless error.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



CRANE McCLENNEN
Assistant Attorney General

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mailed this 27th day of
January, 1984, to:

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3065D:bb

EXHIBITS ADMITTED IN EVIDENCE

Number	Identified	Offered by	Admitted	Description
1	10-23-74, at 60 10-28-74, at 113	Plaintiff	10-28-74, at 119	Photograph of victim Linda
2	10-23-74, at 60 10-28-74, at 115	Plaintiff	10-28-74, at 119	Photograph of victim Iona
3	10-24-74, at 58	Plaintiff	10-23-74, at 67	Diagram of house
6	10-24-74, at 68	Plaintiff	10-24-74, at 39	Photograph of north wall of bedroom
7	10-24-74, at 66	Plaintiff	10-24-74, at 39	Photograph showing west side of bedrrom
8	10-24-74, at 69 10-28-74, at 23	Plaintiff	10-24-74, at 39	Photograph of northwest corner of bedroom
9	10-28-74, at 17	Plaintiff	10-24-74, at 39	Photograph of northwest corner of room
10	10-28-74, at 15 10-29-74, at 94	Plaintiff	10-24-74, at 39	Photograph of door into bedroom
11	10-24-74, at 68 10-28-74, at 13	Plaintiff	10-24-74, at 39	Photograph of door into bedroom
18	10-29-74, at 66	Plaintiff	10-24-74, at 39	Photograph of living room closet door
19		Plaintiff	10-24-74, at 39	Photograph
20	10-24-74, at 43 10-28-74, at 45	Plaintiff	10-24-74, at 39	Photograph of closet in living room
21	10-28-74, at 19 10-29-74, at 91	Plaintiff	10-24-74, at 39	Photograph taken in hall
22		Plaintiff	10-24-74, at 39	Photograph
23		Plaintiff	10-24-74, at 39	Photograph
24	10-28-74, at 28	Plaintiff	10-28-74, at 29	Coleman fuel can and funnel from bookcase
25	10-24-74, at 31, 10-28-74, at 29 10-31-74, at 8	Plaintiff	10-28-74, at 29	Coleman fuel can found in living room closet
27	10-29-74, at 4 10-31-74, at 10	Defendant	10-31-74, at 10	Piece of carpeting from master bedroom
28	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room

EXHIBIT "A"

Number	Identified	Offered by	Admitted	Description
29	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room
30	10-28-74, at 10, 12 10-31-74, at 6	Plaintiff	10-28-74, at 12	Material sample from room
32	10-28-74, at 23	Plaintiff	10-23-74, at 69	Photographs of scene on 11-16-73
36	10-28-74, at 24	Plaintiff	10-24-74, at 41	Photograph of bathroom and Coleman lantern
37	10-24-74, at 38	Plaintiff	10-24-74, at 40	Photograph of closet in bedroom
42	10-24-74, at 36, 70, 72 10-28-74, at 22	Plaintiff	10-24-74, at 37	Photograph of wall in bedroom
43	10-24-74, at 36, 71 10-28-74, at 23, 105	Plaintiff	10-24-74, at 37	Photograph of room before removal of bodies
44	10-24-74, at 36, 70	Plaintiff	10-24-74, at 37	Photograph of room before removal of bodies
50	10-31-74, at 44	Plaintiff	10-31-74, at 45	Coleman can by door
51	10-28-74, at 25 10-31-74, at 46, 71	Plaintiff	10-28-74, at 25	Coleman lantern
56		Plaintiff	10-24-74, at 37	Baggie containing ashes
57		Plaintiff	10-24-74, at 37	Baggie with envelope
58	10-24-74, at 34 10-28-74, at 53	Plaintiff	10-24-74, at 37	Photograph of box springs
59	10-24-74, at 33, 67	Plaintiff	10-24-74, at 34	Photograph of a portion bed
60	10-24-74, at 33, 66	Plaintiff	10-24-74, at 34	Photograph of box springs
62	10-24-74, at 32, 66 10-28-74, at 18	Plaintiff	10-24-74, at 33	Photograph of bedroom window
64		Plaintiff	10-24-74, at 39	Photograph
65	10-24-74, at 49	Plaintiff	10-24-74, at 39	Photograph of burn patterns in tile
66	10-24-74, at 49	Plaintiff	10-24-74, at 39	Photograph

Number	Identified	Offered by	Admitted	Description
67	10-24-74, at 49 10-28-74, at 16 10-30-74, at 85 11-7-74, at 12	Plaintiff	10-24-74, at 39	Photograph of closet door
68	10-24-74, at 49, 65	Plaintiff	10-24-74, at 39	Photograph
69	10-30-74, at 79 11-7-74, at 13	Plaintiff	10-24-74, at 39	Photograph of children's closet (close up)
72	10-23-74, at 69 10-24-74, at 72 10-28-74, at 105	Plaintiff	10-23-74, at 69	Photographs of scene on 11-16-73
75	11-6-74, at 96	Plaintiff	11-6-74, at 97	Manilla envelope containing envelopes
76	11-6-74, at 98 11-12-74, at 120	Defendant	11-12-74, at 131	Letter addressed to Stameys
77	11-7-74, at 14	Defendant	11-7-74, at 15	Photograph of beds
78	11-7-74, at 14	Defendant	11-7-74, at 14	Photograph of room
82	11-7-74, at 33	Defendant	11-7-74, at 34	Photograph of southwest corner of room
87	11-7-74, at 26	Defendant	11-7-74, at 27	Photograph of pieces of carpet
89	11-7-74, at 26	Defendant	11-7-74, at 28	Photograph of pieces ofcarpet and bed springs
90	11-7-74, at 26	Defendant	11-7-74, at 27	Photograph of pieces of carpet
109	11-7-74, at 25 11-12-74, at 123	Defendant	11-7-74, at 26	Photograph of kitchen
124	10-28-74, at 106 10-30-74, at 46, 69	Defendant	10-30-74, at 69	Photograph
131	11-7-74, at 22	Defendant	11-7-74, at 55	Photograph of room
132	11-7-74, at 15	Defendant	11-7-74, at 21	Photograph of room
136	11-7-74, at 35	Defendant	11-7-74, at 46	Model of bedroom
139	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
140	10-31-74, at 21	Plaintiff	11-31-74, at 24	Gastromatograph graph
141	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
142	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph

Number	Identified	Offered by	Admitted	Description
143	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
144	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
145	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
146	10-31-74, at 21	Plaintiff	10-31-74, at 24	Gastromatograph graph
147	10-29-74, at 3	Defendant	10-29-74, at 3	Photograph in living room
149	10-28-74, at 6	Plaintiff	10-24-74, at 39	Photograph of living room closet door
153	10-24-74, at 72 10-28-74, at 25	Plaintiff	10-24-74, at 39	Photograph looking into rafters
154	10-28-74, at 12	Plaintiff	10-24-74, at 39	Photograph of doorway into room
155	10-31-74, at 24	Plaintiff	10-31-74, at 24	Logarithmic scale
156		Defendant	11-7-74, at 84	Figures on easel
157	11-12-74, at 112	Defendant	11-12-74, at 113	Film of morning of fire
158	11-14-74, at 109	Defendant	11-14-74, at 109	Transcript of conversation between defendant and insurance agent.

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS
BONDS - REVOKE
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, X. Dollins

CR 78779

STATE OF ARIZONA

vs.

JOHN HENRY KNAPP

Attorney General
by: Crane McClennan

James E. Scarboro/Larry A. Hamm
Mark S. Wallace/Parker C. Fo

Having been submitted for initial review pursuant to Rule 32, the Court has carefully read the petition, the response and the repl The Court has also reviewed the court files in the matter.

Defendant alleges the trial court erred in refusing to allot funds to defendant's expert to XXXXconstruct a full scale replica of the room in which the fire took place. PUrsuant to Rule 32, defendant is precluded from now raising this issue as it was raised in his fifth appeal and decided adversely to defendant's position.

Defendant alleges the trial court erred in excluding evidence of the experiments conducted by defendant's expert. This matter was carefully addressed on the record by the trial court and the ruling could have been tested on appeal. It is now waived by failu to raise on appeal or precluded by having been already decided.

Defendant contends that it is the combination of the foregoing two alleged errors that is itself the error. These matters were known to defendant at the time of the appeal and the first PCR. The matters are carefully documented in the record. Defendant has waived this argument by failing to timely raise it heretofore.

Defendant alleges this confession was not voluntary. This iss was raised in defendant's first appeal and the Court decided against him. He is now precluded from raising this issue.

Defendant alleges the evidence was illegally seized from the trailer after the date of the fire and that he has not waived this issue because there has been a change in the law since his trial. A careful review of the record shows only two items seized after the day of the fire - a full can of Coleman fuel from the living room and the Coleman lantern found in the bathroom. Pictures of these items were taken in place on the day of the fire and the

(continued)

Exhibit B

OFFICE DISTRIBUTION

APPEALS
BONDS PENDING
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE
By Date (Judge) (Clerk)
K. Dollins
(Deputy)

CR 78779 STATE v. KNAPP *(continued)

clear and supports the constitutionality of this statute.

3. The sentencing court's failure to consider doubt as to defendant's guilt as a mitigating factor. The record in this regar is lengthy and clear. The sentencing judge did not feel that he could consider this matter as a mitigating factor, but stated that even if he could, he did not consider the matter mitigating. The matter was squarely before the XXXXXXX appellate court on appeal and is not now properly raised in a Rule 32 proceeding.

4. The sentencing court erred in finding defendant acted in a heinous, cruel or depraved manner under the Arizona definition. This claim has been rejected in Gretzler and the appellate decisior herein.

5. The capital sentencing statute is unconstitutional for failure to establish the burden of proof. Inasmuch as the state proved the aggravating factor "burning a child to death" beyond a reasonable doubt and the sentencing court found this to be "heinou cruel or depraved" and the appellate court agreed, this issue does not apply in this case.

6, 7 and 8. The defendant had a right to sentencing by a jury This claim has been rejected in Gretzler.

Based upon the foregoing analysis, there is no questions of law or fact raised upon which defendant might obtain relief and ,

IT IS ORDERED denying defendant's petition for post convictior relief.

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

APPEALS
BONDS - REFUND
ADMIN.
CHANGE OF VENUE
JURY FEES
REWARDS
SENTENCING

10 June 16, 1983 HON. MARILYN A. RIDDEL VIVIAN KRINGLE, Clerk
K. Dollins, Deputy

CR 78779 STATE v. KNAPP (continued)

pictures were admitted without objection. Many witnesses described the items having seen them during and immediately after the fire. The testimony was without objection. Even if seized illegally, a fact which need not be decided here, the admission of the items themselves was harmless in view of the pictures and the testimony.

Defendant alleges the items seized the day of the fire were illegally seized. This issue was raised initially in writing in the trial court but abandoned during argument and never again raised until this PCR. There is no issue of fact in dispute as to the ~~XX~~items and times of seizure and circumstances of seizure and a study of the authorities cited in the arguments made herein does not favor defendant's position and thus this issue does not form the basis for relief for defendant.

Defendant alleges the Arizona Supreme Court did not conduct an appropriate review of his sentence as it failed to make a peoportic review. This Court has no jurisdiction to rule that the Arizona Supreme Court erred. A review of both opinions indicates the Court knew what its job was and set about doing it.

As to his contentions regarding errors in sentencing, defendan alleges:

1. The Arizona Supreme Court failed to conduct a proportional review - both where the death penalty was imposed, as well as where there was a life sentence. The record has been quoted extensively by both parties from the record on each of the appeals herein. The Supreme Court obviously knew its job, did it as it saw it and this trial court is in no legal position to take issue with its findings.

2. The Arizona Capital sentencing statute is constitutionally infirm because: (a) it does not provide adequate guidance to the trial court in imposing sentence. Gretzler rule to the contrary. (b) for failure to require the State to prove beyond a reasonable doubt that ~~X~~aggravating factors exist and outweigh the mitigating factors. The law does not support this allegation. (c) it requires death penalty if the State proves one or more aggravating factors defendant is unable to show sufficient mitigating factors. The la

(continued)

S. ALAN COOK
CLERK

ANNA L. CATES
CHIEF DEPUTY CLERK

Supreme Court

STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

October 19, 1983

STATE OF ARIZONA, Appellee, vs. JOHN HENRY KNAPP, Appellant.	Supreme Court No. 3106-2-PC Maricopa County No. CR-78779

The following action was taken by the Supreme Court of the State of Arizona on October 18, 1983 in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED.
FURTHER ORDERED: Motion for Oral Argument - DENIED.
FURTHER ORDERED: The Stay heretofore entered is vacated.

Justice Stanley G. Feldman voting to grant both petition and motion."

Record on Petition for Post Conviction Relief returned to Maricopa County Superior Court this 19th day of October, 1983, to wit: Instruments (3 Parts); Minute Entries.

S. ALAN COOK, Clerk

By Kathleen E. Kemplen
Deputy Clerk

TO:
James E. Scarboro, Esq., Mark S. Wallace, Esq., and Parker C. Folse III, Esq., Martori, Meyer, Hendricks & Victor, 2700 North Third Street, Suite 4000, Phoenix, Arizona 85004
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007 Attn: Crane McClennen
Thomas E. Collins, Maricopa County Attorney, 101 West Jefferson Street, Phoenix, Arizona 85003
Hon. Marilyn A. Riddell, Judge, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003
Vivian Kringle, Clerk, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003 (Certified Copy)
John Henry Knapp, Box B 33659, Arizona State Prison, Florence, Arizona 85232

Exhibit C